IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. KENNETH EDWARD PETTY, Defendant-Appellant.	)))))))))	SUPREME COURT 18-0437

APPEAL FROM THE IOWA DISTRICT COURT
FOR POTTAWATTAMIE COUNTY
HONORABLE JAMES S. HECKERMAN, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On the 5th day of November, 2018, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Kenneth Petty, # 1019504, Anamosa State Penitentiary, 406 North High Street, Anamosa, IA 52205.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. DID THE DISTRICT COURT ERR IN DENYING PETTY'S MOTION IN ARREST OF JUDGMENT BECAUSE HE WAS NOT FULLY INFORMED OF THE CONSEQUENCES OF HIS GUILTY PLEAS?

Authorities

Iowa R. Crim. P. 2.24(3)(b)

Iowa R. Crim. P. 2.8(2)(d)

Iowa R. Crim. P. 2.24(3)(a)

State v. Smith, 753 N.W.2d 562, 564 (Iowa 2008)

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State v. Fisher, 877 N.W.2d 676, 680 (Iowa 2016)

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State v. Harrington, 893 N.W.2d 36, 41 (Iowa 2017)

State v. Kirchoff, 452 N.W.2d 801, 804 (Iowa 1990)

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State v. Moore, 638 N.W.2d 735, 738 (Iowa 2002)

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Iowa R. Crim. P. 2.23(3)(a)

II. IF ERROR WAS NOT PRESERVED, DID TRIAL COUNSEL PROVIDE INEFFECTIVE ASSISTANCE IN FAILING TO ADEQUATELY ASSERT PETTY WAS NOT FULLY INFORMED OF THE CONSEQUENCES OF HIS GUILTY PLEAS WHICH RESULTED IN STRUCTURAL ERROR?

Authorities

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III. DID THE DISTRICT COURT ERR AND DENY PETTY THE RIGHT TO COUNSEL BY FAILING TO THOROUGHLY INQUIRE INTO THE BREAKDOWN IN THE ATTORNEY-CLIENT RELATIONSHIP?

Authorities

State v. Tejeda, 677 N.W.2d 744, 749 (Iowa 2004)

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IV. DID THE DISTRICT COURT ENTER AN ILLEGAL SENTENCE IN IMPOSING A SECTION 911.2B SEXUAL ABUSE VICTIM SURCHARGE?

Authorities

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State v. Lyle, 854 N.W.2d 378, 382 (Iowa 2014)

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State v. Fisher, 877 N.W.2d 686, 685-86 (Iowa 2016)

V. DID THE DISTRICT COURT ERR IN FAILING TO DETERMINE PETTY'S REASONABLE ABILITY TO PAY THE COSTS OF HIS LEGAL REPRESENTATION AND COURT COST?

Authorities

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State v. Van Hoff, 415 N.W.2d 647, 649 (Iowa 1987)

State v. Swartz, 601 N.W.2d 348, 354 (Iowa 1999)

State v. Jackson, 601 N.W.2d 354 (Iowa 1999)

Iowa Code § 910.7 (2017)

Iowa Code § 910.3 (2017)

State v. Kurtz, 878 N.W.2d 469, 471-72 (Iowa Ct. App. 2016)

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State v. Poland, No. 17-0189, 2018 WL 3302201, at *6 (Iowa Ct. App. July 5, 2018)

State v. Boutchee, No. 17-1217, 2018 WL 3302010, at *5 (Iowa Ct. App. July 5, 2018)

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Iowa Code § 625.8 (2017)

Iowa Code § 602.8102(99) (2017)

Iowa Code § 602.8102(135) (2017)

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Iowa Code § 907.8 (2017)

Iowa Code § 910.4 (2017)

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Iowa Code § 602.8107(6) (2017)

Iowa Ct. R. 26.2(10)(c)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court. Petty requests the Court clarify the proper scope and procedure to consider the defendant's reasonable ability to pay criminal restitution and/or overrule conflicting case law. Iowa R. App. P. 6.903(2)(d), 6.1101(2)(b), and 6.1101(2)(f). Published Supreme Court case law is conflicting. See e.g. State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984)(The offender's reasonable ability to make restitution is an express condition on the determination of the amount of restitution for court costs and attorney fees.); State v. Haines, 360 N.W.2d 791, 797 (Iowa 1985)(Restitution for court costs and attorney fees to the county is limited "to the extent that the offender is reasonably able to do so."); State v. Blank, 570 N.W.2d 924, 927 (Iowa 1997)("The focus is not on whether a defendant has the ability to pay the entire amount of restitution due but on his ability to pay the current installments."); State v. Swartz, 601 N.W.2d 348, 354 (Iowa 1999)(Without a plan of payment

and exhausting remedy provided in section 910.7, defendant may not advance reasonable ability to pay claim in appellate court.); State v. Jackson, 601 N.W.2d 354, 357 (Iowa 1999)(same as Swartz); State v. Jose, 636 N.W.2d 38, 45 (Iowa 2001)(Distinguishing Swartz and Jackson as a challenge to the "restitution plan of payment," from Jose's challenge to the total amount of restitution or the "plan of restitution."); State v. Jenkins, 788 N.W.2d 640, 646-647 (Iowa 2010)("A contingent postdeprivation remedy where the offender may be unrepresented does not give this court comfort in the context of procedural due process."). This Court should clarify the proper procedure and scope of the "reasonable ability to pay" provision and overrule conflicting case law.

Additionally, Petty requests the Supreme Court to clarify the proper standard of review for the denial of a motion in arrest of judgment. *Compare* State v. Smith, 753 N.W.2d 562, 564 (Iowa 2008)(abuse of discretion); State v. Myers, 653 N.W.2d 574, 581 (Iowa 2002)(same) and State v. Fisher, 877

N.W.2d 676, 680 (Iowa 2016)(the Court ordinarily reviews challenges to guilty pleas for correction of errors at law).

STATEMENT OF THE CASE

Nature of the Case: Appellant Kenneth Petty appeals following his guilty pleas, judgment and sentence, to the charge of lascivious acts with a child in violation of Iowa Code sections 709.8(1), 709(8(2) and 903B.1 (2015) and sexual exploitation of a minor in violation of Iowa Code sections 728.1(12) and 903B.1 (2015).

Course of Proceeding and Disposition Below: On December 29, 2016, the State charged Petty with sexual abuse in the second degree for acts alleged on June 1, 2015. (038 TI)(App. pp. 5-7). Also on December 29, 2016, Petty was charged with four counts of sexual abuse in the third degree and three counts of sexual exploitation of a minor. (039 TI)(App. pp. 8-10). The State amended the Trial Information in FECR152039 on January 4, 2018. The Amended Trial Information charged two counts of sexual abuse in the third

degree and three counts of sexual exploitation of a minor. (039 Motion to Amend; 039 Amended TI; 1/4/18 039 Order)(App. pp. 19-25).

The trial in FECR152039 was scheduled for January 17, 2018. (039 1/8/18 Order)(App. pp. 26-27). Prior to the start of trial, Petty and the State entered into a plea agreement. (Plea Tr. p. 24L21-p. 25L24). The plea agreement provided: Petty plead guilty to sexual exploitation of a minor (039 Ct. III) and lascivious acts with a child (038 amended); Petty would be sentenced to prison for a period not to exceed ten years on each count to be served concurrently; and he would be "subject to the provisions relating to the sex abuse registry and lifetime parole issue." (Plea Tr. p. 26L14-p. 28L11). Petty entered an Alford plea to the two counts. Sentencing was scheduled for March 12, 2018. (Plea Tr. p. 29L23-p. 30L5; 038 1/17/18 Order; 039 1/17/18 Order)(App. pp. 28-31).

On January 18, 2018, defense counsel moved to withdraw citing a conflict with Petty. (MTW)(App. pp. 32-33).

The court scheduled a hearing on the motion to withdraw for the same date as sentencing. (038 1/18/18 Order; 039 1/18/18 Order)(App. pp. 34-37). On January 30, 2018, Petty filed a motion in arrest of judgment. (MAJ; Affidavit)(App. pp. 38-41). The motion in arrest of judgment was scheduled for the same time as the sentencing hearing. (038 1/30/18 Order; 039 1/30/18 Order)(App. pp. 42-45). The State resisted the motion in arrest of judgment. (Resistance)(App. p. 46).

On March 12, 2018, the district court overruled Petty's motion in arrest of judgment. Petty was sentenced to ten years in prison for each count to be served concurrently. The court also committed Petty to the custody of the Department of Corrections for lifetime parole which will commence at the end of the sentence for the underlying offenses. The court also ordered Petty to pay the cost of his legal representation and all court costs. The other counts were dismissed. (Sent. Tr. p.

29L14-p. 30L7; 3/12/18 Court Order)(App. pp. 47-49). Notice of Appeal was filed on March 12, 2018. (NOA)(App. p. 50).

Facts: Petty entered guilty pleas pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970). (Plea Tr. p. 29L23-p. 30L5). The district court could have found the following factual basis from the Minutes:

In FECR152038, Z.C. said when she was nine years old and living in the Featherstone apartments, she was sleeping in her mother's bed. Z.C. said she was lying down in her mom's room when Petty came up and put his finger inside her vagina and it hurt. Z.C. said Petty also touched her "boobs" with his hands under her clothes. Z.C. stated that her mom came in and looked straight at her and Petty who was sitting on the bed and touching her. Z.C. stated that she doesn't think her mom saw it. But Z.C. said that her brother walked in the room after her mom did and told Petty to get off her and get out. Z.C.'s mother and brother stated they did not see

anything happen between Petty and Z.C. (038 Minutes)(Conf. App. pp. 4-129).

In FECR152039, M.S. told staff at Children's Square that she had sex with Petty who videotaped the incidents. Pursuant to a search warrant, Detective Chase seized electronic devices and the FBI located a video on an electronic device. M.S. identified herself in a still photograph taken from the video. M.S. said she did have sex with Petty during the making of that video and that it was in his bedroom located in Council Bluffs. M.S. stated she did not remember the date this happened but she was fifteen or sixteen years old at the time. (039 Minutes)(Conf. App. 130-269). Petty was over the age of eighteen. (Plea Tr. p. 41L14-17).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING PETTY'S MOTION IN ARREST OF JUDGMENT BECAUSE HE WAS NOT FULLY INFORMED OF THE CONSEQUENCES OF HIS GUILTY PLEAS.

Preservation of Error.

Petty filed a timely motion in arrest of judgment. (038 1/17/18 Order; 039 1/17/18 Order; MAJ)(App. pp.28-31, 38-39). See Iowa R. Crim. P. 2.24(3)(b)(defendant must file a motion in arrest of judgment no later than forty five days after the plea, but in any case no later than five days before the sentencing). Relevant to the appeal, Petty asserted he did not adequately understand the penal consequences. (MAJ ¶3d)(App. pp. 38-39). Error was preserved by the motion. Iowa R. Crim. P. 2.8(2)(d)("challenges to a plea of guilty based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment"); Iowa R. Crim. P. 2.24(3)(a) ("application by the defendant that no judgment be rendered on a ...plea...").

Standard of Review.

This Court has held the standard of review for denials of a motion in arrest of judgment is for abuse of discretion. State v. Smith, 753 N.W.2d 562, 564 (Iowa 2008); State v. Myers, 653 N.W.2d 574, 581 (Iowa 2002). An abuse of

discretion will only be found where the court's discretion was exercised on clearly untenable or unreasonable grounds. State v. Craig, 562 N.W.2d 633, 634 (Iowa 1997). "A ruling is untenable when the court bases it on an erroneous application of law." State v. Smith, 753 N.W.2d at 564 (citing Graber v. City of Ankeny, 616 N.W.2d 633, 638 (Iowa 2000)).

However, the Court ordinarily reviews challenges to guilty pleas for correction of errors at law. State v. Fisher, 877 N.W.2d 676, 680 (Iowa 2016). The ultimate determination to arrest judgment in the guilty plea context is whether there is a defect in the plea proceeding. Iowa R. Crim. P. 2.24(3)(d). If the court failed to substantially comply with Iowa Rule of Criminal Procedure 2.8(2)(b) an error in the plea proceeding occurred. State v. Meron, 675 N.W.2d 537, 542 (Iowa 2004)("before accepting a plea of guilty, rule 2.8(2)(b) requires the court to determine if the plea is voluntarily and intelligently made and has a factual basis."). Rule 2.8(2)(b) does not contain a discretionary component for a felony plea

proceeding. Iowa R. Crim. P. 2.8(2)(b). Whether the district court substantially complied with Rule 2.8(2)(b) is a matter of interpreting the rule which ordinarily is reviewed for errors at law. State v. Harrington, 893 N.W.2d 36, 41 (Iowa 2017). Therefore, Petty submits the proper standard of review is for corrections of errors at law.

Discussion.

A defendant waives a variety of constitutional rights by pleading guilty to a criminal offense, and it is fundamental that a plea of guilty is valid only if it is given voluntarily, knowingly, and intelligently. State v. Meron, 675 N.W.2d at 542. Before accepting a guilty plea, Rule 2.8(2)(b) requires the court to determine if the plea is voluntarily and intelligently made and has a factual basis. State v. Kirchoff, 452 N.W.2d 801, 804 (Iowa 1990). To satisfy this requirement, the court is required to make a specific inquiry into a number of matters set forth in Rule 2.8(2)(b). State v. Meron, 675 N.W.2d at 542; Iowa R. Crim. P. 2.8(2)(b).

In a felony case, the court must literally comply with Rule 2.8(2)(b) requirement for an in-court colloquy. State v. Hook, 623 N.W.2d 865, 869 (Iowa 2001); State v. Moore, 638 N.W.2d 735, 738 (Iowa 2002). The Court must look toward the in-court colloquy as the source for determining compliance with the requirements of Rule 2.8(2)(b). Substantial compliance is required. State v. Myers, 653 N.W.2d 574, 577-78 (Iowa 2002). Under the substantial compliance standard, a trial court is not required to advise a defendant of his rights using the precise language of the rule; it is sufficient that the defendant be informed of his rights in such a way that he is made aware of them. Id. at 578. The record must confirm the existence of substantial compliance in advising the defendant of all direct consequences of the plea. State v. Meron, 675 N.W.2d at 542; State v. Weitzel, 905 N.W.2d 397, 408 (Iowa 2017).

The district court failed to fully advise Petty as to the penal consequences of his guilty pleas to lascivious acts with a

child and sexual exploitation of a minor. During the guilty plea, as to the mandatory minimum and maximum penalty, the district court informed Petty:

THE COURT: * * *

So then, sir, with respect to Count III, the charge of Sexual Exploitation of a Minor in violation of Section 728.12(1) and 903B.1, that you're entering a plea of guilty to that charge, that that charge is a Class C Felony carrying up to ten years in prison.

Then in Case Number 152038, that you're entering a plea of guilty to an amended charge of Lascivious Acts in violation of Section 709.8(1) and 709. -- I'm sorry, Shelly, 2?

[Prosecutor]: On the –

THE COURT: Lascivious.

[Prosecutor]: Okay. Yeah, yeah, 709.8(1)(a) and 709.8(2)(a).

THE COURT: All right. And that, likewise, is a Class C Felony. That Mr. Petty is pleading guilty to that charge as well; that these sentences will be served concurrently; that he will be committed to the Director of the Department of Corrections -- Department of Correctional Services for a term not to exceed ten years on each. Those sentences to be served concurrently. And that he's subject to provisions relating to the sex abuse registry and lifetime parole issues.

Is that correct, Shelly?

[Prosecutor]: Correct.

THE COURT: All right.

Drew, is that your understanding as well?

[Defense counsel]: Correct.

THE COURT: All right.
Kenny, is that your understanding as well?

THE DEFENDANT: That I have to go to prison?

THE COURT: Correct, yes.

(Tr. p. 27L9-p. 28L20).

THE COURT: All right.

So then, Ken, with respect to the charge -- the amended charge of sexual abuse -- I'm sorry, the amended charge of Lascivious Acts in Case Number FECR152038, how do you plead to that charge, sir?

THE DEFENDANT: Yes, sir, guilty.

THE COURT: All right. And you understand that's a Class C felony carrying up to ten years in prison –

THE DEFENDANT: Yeah.

THE COURT: -- and/or a $10,000 fine? You understand that's the maximum penalty?

THE DEFENDANT: Yeah.

(Plea Tr. p. 32L14-p. 33L1).

The district court failed to fully inform Petty of the penal consequences of his guilty pleas. Lascivious acts with a child and sexual exploitation of a minor are class C felonies. Iowa Code §§ 709.8(1)(a) and 709.8(2); Iowa Code § 728.12(1). Iowa Code section 902.9 provides in relevant part:

> 1. The maximum sentence for any person convicted of a felony shall be that prescribed by statute or, if not prescribed by statute, if other than a class "A" felony shall be determined as follows:
> ***
> d. A class "C" felon, not an habitual offender, shall be confined for no more than ten years, and in addition shall be sentenced to a fine of at least one thousand dollars but not more than ten thousand dollars.
> ***
> 2. The surcharges required by sections 911.1, 911.2, 911.2A, and 911.3 shall be added to a fine imposed on a class "C" or class "D" felon, as provided by those sections, and are not a part of or subject to the maximums set in this section.

Iowa Code § 902.9(1)(d), (2) (2015)[1].

The legislature did not provide a specific penalty for lascivious acts with a minor in violation of Iowa Code section 709.8(1)(a). Iowa Code section 709.8(2)(a) provides a violation

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1 Section 902.9 was renumbered in 2013. 2013 Acts, ch. 30, § 224. But otherwise there are no substantial differences in

of subsection (a) is a class C felony without any additional penalty proscribed. Iowa Code § 709.8(2)(a) (2015). Therefore, Iowa Code section 909.9 provides the minimum and maximum penalty. Petty was not advised of the minimum fine of one thousand dollar fine.

The legislature established a specific penalty for sexual exploitation of a minor in violation of Iowa Code section 728.1(12). The offense is a class "C" felony. "Notwithstanding section 902.9, the court may assess a fine of not more than fifty thousand dollars for each offense under this subsection in addition to imposing any other authorized sentence." Iowa Code § 728.12(1) (2015). Therefore, section 728.12(12) provides the maximum fine and section 902.9(d) provides the minimum fine. Petty was not advised of the maximum fine of fifty thousand dollars or the minimum fine of one thousand dollar fine.

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the 2013 and 2015 Codes.

Iowa Code section 911.1 also mandates the court or the clerk of court to assess "an additional penalty in the form of a criminal penalty surcharge equal to thirty-five percent of the fine." Iowa Code § 911.1(1) (2015). The Supreme Court concluded a defendant must be informed of the surcharge as part of the maximum possible fine. State v. Fisher, 877 N.W.2d 676, 686 (Iowa 2016); State v. Weitzel, 905 N.W.2d 397, 407-408 (Iowa 2017). Petty was not informed of the thirty-five percent surcharge for each fine that is imposed.

Additionally, a person convicted of a class C felony under chapter 709 or a class C felony under 728.12 must be sentenced, in addition to any other penalty provided by law, "to a special sentence committing the person into the custody of the director of the Iowa department of corrections for the rest of the person's life, with eligibility for parole as provided in chapter 906." Iowa Code § 903B.1 (2015). The court's only mention of the lifetime parole penalty was limited to "[a]nd he's subject to provisions relating to the sex abuse registry and

lifetime parole issues." (Plea Tr. p. 28L9-10). This vague statement was insufficient to substantially comply with advising Petty of the mandatory penalty. See State v. Lathrop, 781 N.W.2d 288, 296-97 (Iowa 2010) (legislature intended imposition of lifetime parole to be additional punishment for certain sex offenders). At a minimum a defendant must be advised that he would be committed to the custody of the department of corrections for the rest of his life; the sentence commences upon completion of the sentence for underlying criminal offense; the person begins the sentence under supervision as if on parole; and is subject to the same procedures and rules adopted for persons on parole. Iowa Code § 903B.1 (2015). Appellant submits that additionally, the court must inform a defendant during the plea proceeding that: (1) the board of parole will determine if he is released on parole or placed in a work release program[2]; and the

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2 Parole is a Level Two sanction. Iowa Code § 901B.1(1)(b) (2017). Work release is a Level Three (quasi-incarceration) sanction. Iowa Code § 901B.1(1)(c) (2017).

revocation of release for violations shall be not for a period greater than two years upon a first revocation and five years upon a second or subsequent revocation. Iowa Code § 903B.1 (2015). Petty was not sufficiently advised of the mandatory lifetime parole punishment.

It is the court's duty to inform the defendant of his rights he waives upon his plea of guilty. State v. Meron, 675 N.W.2d at 542. See also State v. Weitzel, 905 N.W.2d at 409 ("Thus, even if the defendant's attorney had talked to [the defendant] about the potential punishments, "reversal is automatic if the court taking the plea does not substantially comply with the requirements of the rule."). The district court failed to substantially inform Petty of the minimum and maximum penalties.

The district court erred in denying Petty's motion in arrest of judgment. The court failed to substantially comply with Iowa Rule of Criminal Procedure 2.8(2)(b)(2). Therefore, Petty was "uniformed of the true maximum punishment."

State v. Weitzel, 905 N.W.2d at 408. Iowa Rule of Criminal Procedure 2.23(3)(a) mandates that a motion in arrest of judgment "shall be granted when upon the whole record no legal judgment can be pronounced." Iowa R. Crim. P. 2.23(3)(a). The court's failure to comply with Iowa Rule of Criminal Procedure 2.8(2)(b)(2) is "mandatory, automatic reversal." State v. Weitzel, 905 N.W.2d at 408. This same remedy is appropriate for the district court's erroneous denial of a motion in arrest of judgment in violation of Iowa Rule of Criminal Procedure 2.23(3)(a). Petty's guilty pleas must be vacated, the judgment reversed and remanded to the district court to allow Petty to plead anew or stand trial.

II. IF ERROR WAS NOT PRESERVED, TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO ADEQUATELY ASSERT PETTY WAS NOT FULLY INFORMED OF THE CONSEQUENCES OF HIS GUILTY PLEAS WHICH RESULTED IN STRUCTURAL ERROR.

Preservation of Error.

The Iowa Supreme Court allows an exception to the general rule of error preservation in ineffective assistance of

counsel claims. State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982). The failure of counsel to preserve error may constitute a denial of effective assistance of counsel. State v. Hrbek, 336 N.W.2d 431, 435-436 (Iowa 1983); Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981).

Standard of Review.

Ineffective assistance of counsel claims involve the violation of a constitutional right. The totality of the circumstances relating to counsel's conduct is reviewed de novo. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987).

Discussion.

The Sixth and Fourteenth Amendments of the United States Constitution and article I section 10 of the Iowa Constitution set forth that a defendant is entitled to the assistance of counsel. The United States Supreme Court held a defendant is entitled to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984). The test for determining whether a defendant

received effective assistance of counsel is "whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

When specific errors are relied upon to show the ineffective assistance of counsel, the defendant must demonstrate (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. Id. In order to establish ineffective assistance of counsel, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different. Strickland v. Washington, 466 U.S. at 694, 104 S.Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

To prove the attorney failed to perform an essential duty, the defendant must show the attorney's performance fell outside the normal range of competency. Snethen v. State,

308 N.W.2d at 14. The Court starts with the presumption the attorney performed in a competent manner. State v. Maxwell, 743 N.W.2d 185, 196 (Iowa 2008). The Court then measures the attorney's performance against the standard of a reasonably competent practitioner. Id. at 195.

"More than mere improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience" must be shown. State v. Cromer, 765 N.W.2d 1, 8 (Iowa 2009)(citations omitted). "If there is no possibility that trial counsel's failure to act can be attributed to reasonable trial strategy, then we can conclude the defendant has established that counsel failed to perform an essential duty." State v. Graves, 668 N.W.2d 860, 870 (Iowa 2003).

Trial counsel filed a motion in arrest of judgment challenging that the guilty pleas were inadequate because Petty did not understand the penal consequences of his pleas. (MAJ ¶3d)(App. pp. 38-39). It is unclear whether counsel

obtained a copy of the transcript[3] of the guilty plea proceeding to demonstrate the plea proceeding was defective because the district court failed to adequately advise Petty of the maximum and minimum penalties. Iowa Rs. Crim. P. 2.8(2)(b)(d) and 2.24(3)(a). Trial counsel failed to present any argument or evidence to substantiate the defect. Trial counsel breached an essential duty. Cf. Lado v. State, 804 N.W.2d 248, 251 (Iowa 2011)("Ineffective assistance, however, is more likely when counsel's alleged actions or inactions result from a lack of diligence, rather than use of judgment." "[T]here is a greater tendency for courts to find ineffective assistance when there has been 'an abdication—not exercise—of ... professional [responsibility].' ")(other citations omitted).

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3 The EDMS docket does not show a transcript was prepared prior to the Appellate Defender ordering a copy. The plea transcript indicates the court reporter charged for an original transcript. (Plea Tr. p. 1L18-20). However, there was reference to a transcript during the hearing. (Sent. Tr. p. 17L12-19, p. 22L7-15, p. 23L25-p. 24L5, p. 26L13-17).

The court failed to advise Petty of the maximum and minimum penalties for lascivious acts with a child in violation of Iowa Code section 709.8(1)(a) and sexual exploitation of a minor in violation of Iowa Code section 728.12(1). See Plea Tr. p. 27L9-p. 28L20, p. 32L14-p. 33L1. Petty was not informed of the minimum fine of one thousand dollars for each charge. Iowa Code § 902.9(d) (2015). Additionally, Petty was not informed that the maximum fine for sexual exploitation of a minor was fifty thousand dollars. Iowa Code § 728.12(1) (2015). Petty was not advised of the thirty-five percent surcharge for each fine imposed. Iowa Code § 911.1(1) (2015); State v. Fisher, 877 N.W.2d 676, 686 (Iowa 2016); State v. Weitzel, 905 N.W.2d 397, 407-408 (Iowa 2017). Petty was not adequately informed of the mandatory lifetime parole special sentence. At a minimum a defendant must be advised that he would be committed to the custody of the department of corrections for the rest of his life; the sentence commences upon completion of the sentence for underlying criminal

offense; the person begins the sentence under supervision as if on parole; and is subject to the same procedures and rules adopted for persons on parole. Iowa Code § 903B.1 (2015). Appellant submits that additionally, the court must inform a defendant during the plea proceeding that: (1) the board of parole will determine if he is released on parole or placed in a work release program; and the revocation of release for violations shall be not for a period greater than two years upon a first revocation and five years upon a second or subsequent revocation. Iowa Code § 903B.1 (2015).

The court failed to substantially comply with Iowa Rule of Criminal Procedure 2.8(2)(b)(2). Therefore, Petty was not advised of the true maximum and minimum punishment. Yet, at the motion in arrest of judgment hearing, trial counsel failed to assert any of these errors. Counsel engaged in an argument with Petty instead of representing Petty's legal interests. (Sent. Tr. p. 5L13-p. 14L24, p. 20L22-p. 21L15). "Lawyers in criminal cases "are necessities, not luxuries." "

United States v. Cronic, 466 U.S. 648, 653, 104 S.Ct. 2039, 2043 (1984). While Petty may have had additional reasons for vacating his guilty pleas, counsel had a duty to protect Petty's interest in a knowing and voluntary guilty plea. The failure to bring the defect in the plea proceeding to the district court's attention fell below the standard of reasonably competent attorneys. Cf. Krogmann v. State, No. 15-0772, 2018 WL 3084028, at *14 (Iowa June 22, 2018).

Generally, in claims of ineffective assistance of counsel in violation of the Sixth Amendment, the standard of prejudice in a guilty plea case is that a defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have plead guilty and would have insisted on going to trial. State v. Straw, 709 N.W.2d 128, 138 (Iowa 2006); Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985). The prejudice element in a guilty plea case "focuses on whether counsel's constitutionally ineffective performance affected the

outcome of the plea process." Hill v. Lockhart, 474 U.S. at 59, 106 S.Ct. at 370.

Defense counsel may also commit "structural errors." Structural errors are not merely errors in a legal proceeding, but errors "affecting the framework within which the trial proceeds." Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265 (1991). The Iowa Supreme Court has recognized structural error occurs when: (1) counsel is completely denied, actually or constructively, at a crucial stage of the proceeding; (2) where counsel does not place the prosecution's case against meaningful adversarial testing; or (3) where surrounding circumstances justify a presumption of ineffectiveness, such as where counsel has an actual conflict of interest in jointly representing multiple defendants. Lado v. State, 804 N.W.2d 248, 252 (Iowa 2011).

Petty was entitled to counsel to represent him at the motion in arrest of judgment hearing. An indigent defendant is entitled to court-appointed counsel to represent him at every

stage of the proceedings. Iowa R. Crim. 2.28(1); Iowa Const. art. 1, §10. Entry of a guilty plea is 'critical stage' of the criminal proceeding. State v. Senn, 882 N.W.2d 1, 36 (Iowa 2016)(Wiggins, J. dissenting)(citing Missouri v. Frye, 132 S.Ct. 1399, 1405 (2012)). Similarly, the hearing to determine whether judgment must be arrested because of a defect in the plea proceeding is also a critical stage of the criminal case. After the right to counsel has attached, "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." State v. Senn, 882 N.W.2d at 36 (Wiggins, J. dissenting)(quoting United States v. Wade, 388 U.S. 218, 226, 87 S.Ct. 1926, 1932 (1967)).

Petty's trial attorney completely abandoned his role as counsel. Counsel failed to advance legal defects in the plea proceeding. Instead, counsel argued with Petty. Counsel questioned Petty in a vague generalized manner which, in

essence, required Petty to make his own legal objections to his guilty plea. (Sent. Tr. p. 5L13-p. 14L24, p. 20L22-p. 21L15). "An attorney, of course, may not ethically urge grounds that are lacking in legal or factual support simply because his client urges him to do so." Gamble v. State, 723 N.W.2d 443, 446 (Iowa 2006). "On the other hand, neither should defense counsel be expected to criticize or diminish their own client's case; that role should be filled, if at all, by counsel for the resisting party." Id. Trial counsel's "representation" amounted to a constructive denial of counsel. "Under these circumstances, "[n]o specific showing of prejudice [is] required" as the criminal adversary process itself is "presumptively unreliable." " Lado v. State, 804 N.W.2d at 252. Petty is entitled to a new hearing on his motion in arrest of judgment where he is provided counsel who will advocate for his legal rights. See Id. ("In sum, when a structural error occurs in a proceeding, the underlying criminal proceeding is so unreliable the constitutional or statutory right to counsel entitles the

defendant to a new proceeding without the need to show the error actually caused prejudice.").

Alternatively, if this Court determines trial counsel's performance does not amount to a structural error, this claim of ineffective assistance of counsel must be preserved for a postconviction relief action for further development of the record. State v. Straw, 709 N.W.2d at 139.

III. THE DISTRICT COURT ERRED AND DENIED PETTY THE RIGHT TO COUNSEL BY FAILING TO THOROUGHLY INQUIRE INTO THE BREAKDOWN IN THE ATTORNEY-CLIENT RELATIONSHIP.

Preservation of Error.

Trial counsel moved to withdraw asserting a breakdown in the attorney-client relationship resulting in the inability to effectively communicate. Trial counsel concluded he could not effectively represent Petty and Petty wanted a new attorney. (MTW; Affidavit)(App. pp. 32-33, 40-41). Error was preserved by the motion. State v. Tejeda, 677 N.W.2d 744, 749 (Iowa 2004).

Standard of Review.

In general, the court reviews a district court denial of motion to withdraw and appoint substitute counsel for an abuse of discretion, because it is the standard applied to a district court's denial of a request for substitute counsel. State v. Martin, 608 N.W.2d 445, 449 (Iowa 2000). However, the trial court failed to inquire into the breakdown in the attorney-client relationship and conflict of interest both of which implicate Petty's right to counsel. Therefore, the standard of review is de novo. State v. Tejeda, 677 N.W.2d at 749.

Discussion.

On January 18, 2018, defense counsel moved to withdraw citing a "false[]" allegation of a conflict with Petty which has caused a breakdown in the attorney-client relationship. (MTW)(App. pp. 32-33). The court scheduled a hearing on the motion to withdraw for the same date as sentencing. (038 1/18/18 Order; 039 1/18/18 Order)(App.

pp. 34-37). The only discussion regarding the motion to withdraw was:

THE COURT: Let the record show that we're here in the matter of State of Iowa versus Kenneth Edward Petty; Case Numbers FECR152038 and FECR152039.

These matters coming to the Court's attention for sentencing. And prior to that the -- for hearing on post-trial motions filed on behalf of the defendant.

* * *

[Defense counsel], it's my understanding that you filed several post-trial motions; is that accurate?

[Defense counsel]: Correct, Your Honor. I filed a motion to withdraw. The Court ordered I appear today. By implication I interpreted that to mean the Court wanted me to file the post-trial motions or motion on behalf of Mr. Petty.

THE COURT: That's correct.

(Sent. Tr. p. 3L1-19). During the hearing, defense counsel referred to his motion to withdraw and his belief Petty needed a different attorney. (Sent. Tr. p. 5L20-p. 6L14, p. 7L20-p. 8L12). The district court did not make any inquiry regarding the breakdown in the attorney-client relationship despite the motion, affidavit, the interaction between Petty and counsel, and Petty's complaints regarding his attorney. (MTW;

Affidavit; Sent. Tr. p. 4L1-p. 15L13, p. 18L10-p.27L19)(App. pp. 32-33, 40-41).

The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Iowa Constitution similarly states: "In all criminal prosecutions ... the accused shall have a right to ... have the assistance of counsel." Iowa Const. art. I, § 10. A claim an attorney has a conflict of interest is a burden to effective assistance of counsel. Holloway v. Arkansas, 435 U.S. 475, 489-90, 98 S.Ct. 1173, 1181 (1978). When a court is made aware of a potential conflict of interest between a defendant and attorney, the court is required to inquire into the circumstances of the conflict. State v. Watson, 620 N.W.2d 233, 236 (Iowa 2000). Where an actual conflict exists, prejudice is presumed and reversal is mandated. Id. at 238; see also State v. Smitherman, 733 N.W.2d 341, 347–48 (Iowa 2007)(noting limited applicability of

the automatic reversal rule, requiring showing of adverse effect where inquiry into conflict is conducted). This inquiry need not be lengthy, depending on whether the court has knowledge of the pertinent facts. See State v. Thompson, 597 N.W.2d 779, 784–85 (Iowa 1999)(holding the trial court was not required to make a longer inquiry into a possible conflict of interest where court witnessed the defendant assault his attorney but the attorney agreed to proceed to closing arguments).

This Court has required that an inquiry be conducted in cases in where the existence of a potential conflict has been made known to the court earlier in the proceedings, when substitute counsel could be appointed to represent the defendant. See State v. Watson, 620 N.W.2d at 242 ("There was a possibility of conflict because of the potential witness problem in the future. More importantly, however, since the court did not determine the extent and nature of [the attorney's concurrent] representations, there was potential for

divided loyalties in the present."); see also Connor v. State, 630 N.W.2d 846, 848–49 (Iowa Ct. App. 2001)(finding the possibility of a conflict where defendant filed an ethics complaint against counsel but no inquiry was made by the court into the nature of the ethics complaint). Additionally, the court must conduct a inquiry into whether there is "a complete breakdown in communication between the attorney and the defendant" to the extent a defendant's constitutional right to counsel was violated. State v. Tejeda, 677 N.W.2d at 751-52.

"[T]he right to counsel demands the court promptly deal with the issue of the conflict, and not let it simmer on the back burner." State v. Powell, 684 N.W.2d 235, 241 (Iowa 2004). "Once the court is made aware of a gestating conflict it is insufficient to merely leave open the possibility of further inquiry without undertaking any follow-up measures." Id. As indicated, there is nothing in the record to suggest the court inquired into this matter. "There was not any other

mechanism by which the issue . . . would be addressed" and it is "unrealistic to expect more from a defendant untrained in the law." Id. "The court has the heavy burden here to seek sufficient information to make an informed decision as to whether there is a conflict of interest." Id.

The present record shows an actual conflict between Petty and defense counsel. Petty alleged defense counsel acted improperly and/or provided him ineffective assistance. Defense counsel could not effectively represent Petty's interests in the motion in arrest of judgment hearing while asserting his own interests. Iowa R. of Prof'l Conduct 32:1.7(2)("a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: ... there is a significant risk that the representation of one ...client[] will be materially limited ...by a personal interest of the lawyer."). See also Iowa R. of Prof'l Conduct 32:1.7 cmt. 10 ("The lawyer's own interests should not be permitted to have an adverse effect on representation of

a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice."). "A trial court has the duty sua sponte to inquire into the propriety of defense counsel's representation when it "knows or reasonably should know that a particular conflict exists." " State v. Watson, 620 N.W.2d at 238. The trial court was alerted to the conflict by counsel's motion to withdraw and additionally by Petty's and defense counsel's statements during the hearing. An actual conflict existed and the trial court knew or should have known of the conflict, therefore, reversal is required. Id.

If the Court determines the record does not show an actual conflict, the remedy prescribed for an insufficient inquiry is affirmance of the defendant's convictions on condition and remand for further hearing into the possibility that an actual conflict existed. State v. Powell, 684 N.W.2d at 241-42. Where there is the possibility of a conflict, this Court

as stated that it must remand for inquiry into the allegations. Id. On remand, the record should be developed further to determine whether there was an actual conflict. If an actual conflict is found, Petty must be granted a new hearing on his motion in arrest of judgment. Cf. Powell, 684 N.W.2d at 241–42. If the Court finds the record does not disclose an actual conflict, this Court should affirmed based on this condition and remand to the district court for further proceedings.

If the Court finds the record does not disclose an actual conflict or possible conflict, but a colorable claim of a complete breakdown in the attorney-client relationship, the proper remedy given the circumstances of this case is a remand for a hearing on the motion to withdraw. In Tejeda, the Court determined the proper remedy was to preserve the issue for a postconviction relief hearing. State v. Tejeda, 677 N.W.2d at 753. The present case is distinguishable from Tejeda. Tejeda involved a pretrial breakdown in communication. The Court

stated a pretrial breakdown in communication may resolve itself prior to trial. Id. at 752. Here, the breakdown in communication and in the attorney-client relationship occurred after the entry of the guilty pleas. The breakdown clearly did not resolve itself prior to the motion in arrest of judgment hearing, during the hearing or during the sentencing hearing. The posture of the present case requires a different remedy; a remand for a hearing on the motion to withdraw. If the motion is meritorious and should be granted, then Petty is entitled to a new hearing on the motion of arrest of judgment with new counsel.

IV. THE DISTRICT COURT ENTERED AN ILLEGAL SENTENCE IN IMPOSING A SECTION 911.2B SEXUAL ABUSE VICTIM SURCHARGE.

Preservation of Error.

"Illegal sentences may be challenged at any time, notwithstanding that the illegality was not raised in the trial court...." State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010); see also Iowa R. Crim. P. 2.24(5)(a)("The court may correct an

illegal sentence at any time."). When "the claim is that the sentence itself is inherently illegal, whether based on constitution or statute," the challenge is a claim of illegal sentence which may be asserted at any time. State v. Bruegger, 773 N.W.2d 862, 872 (Iowa 2009). A claim that application of a new additional penalty to conduct that occurred before the penalty statute's effective date violates ex post facto protections is a claim that the sentence is inherently illegal. Lathrop, 781 N.W.2d at 293. It may thus be asserted on appeal notwithstanding the absence of an objection in the district court. Id.

Standard of Review.

"Although challenges to illegal sentences are ordinarily reviewed for correction of legal errors, [our courts] review an allegedly unconstitutional sentence de novo." State v. Lyle, 854 N.W.2d 378, 382 (Iowa 2014).

Discussion.

In imposing sentencing, the district court did not mention the section 911.2B sexual abuse surcharge. (Sent. Tr. p. 29L14-p. 30L7). The judgement entry provided, "[t]he fines, court costs, surcharges, attorney fees and expenses, and restitution assessed against the Defendant are due immediately." (3/12/18 Court Order, p. 2)(App. p. 48).

Iowa Code section 911.2B provides, in relevant part:

> 1. In addition to any other surcharge, the court or clerk of the district court shall assess a domestic abuse assault, sexual abuse, stalking, and human trafficking victim surcharge of one hundred dollars if an adjudication of guilt or a deferred judgment has been entered for a violation of section 708.2A, 708.11, or 710A.2, or chapter 709.

Iowa Code § 911.2B(1) (Supp. 2016); 2015 Acts 2015 ch. 96, § 15. The financial summary page of the Combined General Docket reveals that $100 "DOMESTIC/SEXUAL ABUSE" victim surcharge was in fact imposed by the Clerk of Court. (038 Combined General Docket, Financial Summary, p. 1)(App. p. 51).

Imposition of the $100 sexual abuse victim surcharge

under Iowa Code section 911.2B (Supp. 2016) violated the Ex Post Facto clauses of the state and federal constitutions and amounted to a constitutionally illegal sentence. The offense charged in FECR152038, was alleged to have occurred on June 1, 2015. (038 TI)(App. pp. 5-7). While the State amended to the charge from sexual abuse in the second degree to lascivious acts with a child, the State did not amend the date of the offense. (Plea Tr. p. 27L19-p. 28L1, p. 33L2-22). Iowa Code section 911.2B was enacted in 2015 and became effective on July 1, 2015. See 2015 Acts 2015 ch. 96, §§ 15 and 17 (approved May 7, 2015, and excluding sexual abuse victim surcharge from specified effective date of January 1, 2016); Iowa Const. art. III, § 26 (providing legislation with no express effective date becomes effective on July 1 following its passage); Iowa Code § 3.7(1) (2015)(same). The charged offense was alleged to have been committed on June 1, 2015, before the effective date of the statute. (038 TI)(App. pp. 5-7). The section 911.2B surcharge provision is inapplicable to the

offense for which Petty was convicted.

Both the State and federal constitutions protect against ex post facto laws. U.S. Const. art. I, § 10; Iowa Const. art. I, § 21; State v. Cowles, 757 N.W.2d 614, 617 (Iowa 2008). "An ex post facto law includes 'one that makes the punishment for a crime more burdensome after its commitment." Lathrop, 781 N.W.2d at 294-95 (quoting State v. Iowa Dist. Ct., 795 N.W.2d 793, 797 (Iowa 2009)). Surcharges are a form of "punishment". State v. Fisher, 877 N.W.2d 686, 685-86 (Iowa 2016)(discussing criminal penalty surcharge, DARE surcharge, and law enforcement initiative surcharge). The section 911.2B sexual abuse victim surcharge, in imposing "additional punishment" is, "[t]herefore... subject to the restrictions imposed by the constitutional prohibition against ex post facto laws." Lathrop, 781 N.W.2d at 297 (considering 903B.1special sentencing statute). Application of the section 911.2B surcharge to conduct that occurred prior to that statute's effective date violates ex post facto protections and,

thereby, amounts to a constitutionally illegal sentence. Id. at 298. Consequently, inclusion of the $100 sexual abuse victim surcharge in the sentence amounted to an illegal sentence, which must now be vacated. Id.

This Court must vacate the district court's imposition of the section 911.2B sexual abuse victim surcharge and remand for entry of a corrected sentencing order omitting such surcharge.

V. THE DISTRICT COURT ERRED IN FAILING TO DETERMINE PETTY'S REASONABLE ABILITY TO PAY THE COSTS OF HIS LEGAL REPRESENTATION AND COURT COST.

Preservation of Error.

An improper award of criminal restitution is an illegal sentence. See State v. Janz, 358 N.W.2d 547, 548-49 (Iowa 1984)(Noting that the practice in Iowa for many years had been to allow either the district court or the appellate court to correct an illegal sentence.); State v. Jose, 636 N.W.2d 38, 44 (Iowa 2001)("[The court noted that where the time for appeal has expired, a defendant must petition the district court under

Iowa Rule of Criminal Procedure [2.24(5)(a)] to correct an illegal sentence.]"). A challenge to an illegal sentence includes a claim that that the sentence itself is unconstitutional. State v. Bruegger, 773 N.W.2d 862, 871 (Iowa 2009). An illegal sentence may be corrected at any time. Iowa R. Crim. P. 2.24(5)(a).

Standard of Review.

This Court reviews restitution orders for correction of errors at law. When reviewing a restitution order, the appellate court determines whether the district court has properly applied the law. State v. Jenkins, 788 N.W.2d 640, 642 (Iowa 2010); State v. Klawonn, 688 N.W.2d 271, 274 (Iowa 2004). The Court's review of constitutional claims is de novo. State v. Dudley, 766 N.W.2d 606, 612 (Iowa 2009).

Discussion.

The Iowa appellate courts have addressed criminal restitution for court costs and attorney fees in many cases, some of which are confusing and conflict with other published

case law. This Court should clarify the process and procedure for imposition of criminal restitution including the constitutional guarantees associated with such an order.

Petty was found to be indigent and was granted court-appointed counsel. (038 1/30/17 Order Appt. Counsel; 038 1/31/17 Order Appt. Counsel; 039 1/30/17 Order Appt. Counsel; 039 1/31/17 Order Appt. Counsel)(App. pp. 11-18). At sentencing, the district court ordered Petty to pay restitution for court costs and attorney fees "due immediately". (3/12/18 Court Order p. 2)(App. p. 48). These costs were order as restitution and have been assessed. (038 Combined General Docket, Financial Summary p. 1; 039 Combined General Docket, Financial Summary p. 1)(App. pp. 51-52).

When a person is granted an appointed attorney, he shall be required to reimburse the state for the total cost of legal assistance provided to the person. Iowa Code § 815.9(3) (2017). "Legal assistance" includes not only the expense of the public defender or an appointed attorney, but also

transcripts, witness fees, expenses, and any other goods or services required by law to be provided to an indigent person entitled to an appointed attorney. Iowa Code § 815.9(3) (2017).

In all criminal cases where judgment is entered, the sentencing court shall order restitution be made. Restitution includes court-appointed attorney fees and court costs. Iowa Code §§ 910.2 and 815.9(4) (2017). Criminal restitution is a criminal sanction that is part of the sentence. Iowa Code §910.2(1) (2017); State v. Alspach, 554 N.W.2d 882, 883 (Iowa 1996); State v. Mayberry, 415 N.W.2d 644, 646 (Iowa 1987). The legislature has inserted restitution, which otherwise would normally be civil, into the criminal proceeding. Cf. State v. Dudley, 766 N.W.2d at 620 ("the legislature has injected this matter, which would ordinarily be civil, in a criminal action and provided for counsel throughout the criminal prosecution, ending with judgment on behalf of the State."). The court is authorized to order criminal restitution pursuant to the

restitution statutes. State v. Bonstetter, 637 N.W.2d 161, 166 (Iowa 2001).

The legislature specifically provided that the imposition of restitution for the cost of legal assistance and court costs is subject to a determination of the defendant's reasonable ability to pay. Iowa Code section 910.2(1) (2017) provides in relevant part:

> In all criminal cases in which there is a plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction is rendered, the sentencing court shall order that restitution be made by each offender to the victims of the offender's criminal activities, to the clerk of court for fines, penalties, surcharges, and, **to the extent that the offender is reasonably able to pay**, for crime victim assistance reimbursement, restitution to public agencies pursuant to section 321J.2, subsection 13, paragraph "b", court costs including correctional fees approved pursuant to section 356.7, court-appointed attorney fees ordered pursuant to section 815.9, including the expense of a public defender, when applicable, contribution to a local anticrime organization, or restitution to the medical assistance program pursuant to chapter 249A.

Iowa Code § 910.2(1) (2017)(emphasis added). See also Iowa Court R. 26.2(10)(a) ("the court shall order the payment of the total costs and fees for legal assistance as restitution to the

extent the person is reasonably able to pay").

A defendant's reasonable ability to pay is a constitutional prerequisite for a criminal restitution order provided by Iowa Code chapter 910. State v. Haines, 360 N.W.2d 791, 797 (Iowa 1985); State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984). Cf. Bearden v. Georgia, 461 U.S. 660, 667 n.8, 103 S.Ct. 2064, 2069 n.8 (1983)("The more appropriate question is whether consideration of a defendant's financial background in setting or resetting sentence is so arbitrary or unfair as to be a denial of due process."). Iowa's recoupment statute does not infringe on a defendant's right to counsel because of the "reasonable ability to pay" determination. State v. Haines, 360 N.W.2d at 793; State v. Dudley, 766 N.W.2d at 614-615. "A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment." Id. at 615.

Published Supreme Court case law is conflicting.

Recently, this Court addressed a sentencing order which stated the court would assess the entirety of defendant's appellate attorney fees against him unless he filed a request for a hearing regarding his reasonable ability to pay them within thirty days of the issuance of Procedendo following his appeal. State v. Coleman, 907 N.W.2d 124, 149 (Iowa 2018). The Supreme Court stated "when the district court assesses any future attorney fees on Coleman's case, it must follow the law and determine the defendant's reasonable ability to pay the attorney fees without requiring him to affirmatively request a hearing on his ability to pay." Id. Coleman appears to follow the Harrison and Haines line of reasoning. Harrison provided that the "reasonable ability to pay" provision is an "express condition on the determination of the amount of restitution for court costs and attorney fees." "The sentencing court would never get to the point of exercising this authority if it were mandated to order full restitution for court costs and attorney fees without regard to the offender's ability to pay."

State v. Harrison, 351 N.W.2d at 529. Therefore, this discretion must be exercised at the sentencing hearing. Id. The Harrison holding was followed in Haines. State v. Haines, 360 N.W.2d at 797 (Court failed to exercise discretion to determine whether Haines was reasonably able to pay all or part of attorney fees).

But in Blank, the Court focused on not on the entire amount of restitution due, but on Blank's ability to pay the current installment. State v. Blank, 570 N.W.2d 924, 927 (Iowa 1997). The Blank Court cited Van Hoff, but did not include the entire holding from the case. Id. The Court in Van Hoff held:

> We do not believe Van Hoff's "reasonable" ability to pay the restitution is necessarily determined by his ability to pay it in full during the period of his incarceration, as held by the court of appeals, although that might be one of the factors to be considered. A determination of reasonableness, especially in a case of long-term incarceration, is more appropriately based on the inmate's ability to pay the current installments than his ability to ultimately pay the total amount due. Van Hoff does not claim that he is paying child support, alimony, or any similar expenses. His living expenses, obviously, are paid by the state. He does not claim that he is unable to pay twenty percent of his prison wages toward the restitution order.

State v. Van Hoff, 415 N.W.2d 647, 649 (Iowa 1987).

In Swartz, the defendant challenged that the district court improperly ordered restitution for the amount of court costs and defendant's court-appointed lawyer fees without first making a determination of the defendant's ability to pay. State v. Swartz, 601 N.W.2d 348, 354 (Iowa 1999). The Court concluded:

> that he may not advance that claim in this court on the present record for two reasons. First, it does not appear that the plan of restitution contemplated by Iowa Code section 910.3 was complete at the time the notice of appeal was filed. Second, Iowa Code section 910.7 permits an offender who is dissatisfied with the amount of restitution required by the plan to petition the district court for a modification. Until that remedy has been exhausted we have no basis for reviewing the issue that defendant raises.

State v. Swartz, 601 N.W.2d at 354.

The Supreme Court decided Jackson the same day as Swartz. State v. Jackson, 601 N.W.2d 354 (Iowa 1999). The Court followed its holding in Swartz. The Court again held that a "plan of restitution contemplated by Iowa Code section 910.3" must be completed before the district court is required

to give consideration to the defendant's ability to pay. And a person who is dissatisfied with the amount of restitution required by the plan must petition pursuant to Iowa Code section 910.7 for a modification. "Unless that remedy has been exhausted, we have no basis for reviewing the issue in this court." State v. Jackson, 601 N.W.2d 354, 357 (Iowa 1999).

The Court in Jose concluded that Swartz had not challenged the total amount of criminal restitution (restitution plan), but the restitution plan of payment. State v. Jose, 636 N.W.2d 38, 45 (Iowa 2001). The Court stated:

> The amount of restitution is part of the sentencing order and is therefore directly appealable, as are all orders incorporated in the sentence. *Janz*, 358 N.W.2d at 549. The ability to pay is an issue apart from the amount of restitution and is therefore not an "order[ ] incorporated in the sentence" and is therefore not directly appealable as such.
>
> The facts in this case differ from those in *Janz* in only one respect. Here, unlike in *Janz*, the amount of restitution had not been determined at the time notice of appeal was filed.
>
> Likewise, the facts in this case differ from those in *Swartz* and *Jackson* in only one respect. Here, Jose challenges the amount of restitution, whereas in *Swartz* and *Jackson* the

defendants only challenged the district court's failure to determine their *ability to pay.* The defendants in *Swartz* and *Jackson* were therefore challenging the "restitution plan of payment," rather than the actual "plan of restitution." Iowa Code § 910.7. At issue here is the plan of restitution, rather than the plan of payment.

State v. Jose, 636 N.W.2d at 45.[4] The Swartz opinion does not use the phrase "plan of payment." Additionally, Swartz and Jackson both refer to Iowa Code section 910.3 plan of restitution. State v. Swartz, 601 N.W.2d at 354; State v. Jackson, 601 N.W.2d at 357. Iowa Code section 910.3 requires the district court to determine the "amount of restitution" and such "court orders shall be known as the plan of restitution." Iowa Code § 910.3 (2017).

The Court of Appeals' opinions regarding the "reasonable ability to pay determination" generally follow Swartz and Jackson that the "reasonable ability to pay determination" is not "ripe" for appeal unless the plan of restitution and the restitution plan of payment are final. See e.g. State v. Kurtz,

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[4] State v. Janz, 358 N.W.2d 547 (Iowa 1984).

878 N.W.2d 469, 471-72 (Iowa Ct. App. 2016)("We conclude Kurtz is able to appeal the restitution order, including the court's failure to consider his ability to pay, because the plan of restitution and the restitution plan of payment were part of the sentencing order from which Kurtz had a right of appeal."); State v. Johnson, 887 N.W.2d 178, 184 (Iowa Ct. App. 2016) ("We conclude [Johnson] is able to appeal the restitution order, including the court's failure to consider his ability to pay, because the plan of restitution and the restitution plan of payment were part of the sentencing order from which [Johnson] had a right of appeal."); State v. Tanner, No. 14-1963, 2016 WL 4384468, at * 5 (Iowa Ct. App. Aug 17, 2016)("It was proper for Tanner to raise the issue on direct appeal because, when the plan of restitution and restitution plan of payment are part of a sentencing order, a defendant has the right to direct appeal."); State v. Poland, No. 17-0189, 2018 WL 3302201, at *6 (Iowa Ct. App. July 5, 2018)("The facts here are similar to the facts of *State v. Johnson*"); State v.

Boutchee, No. 17-1217, 2018 WL 3302010, at *5 (Iowa Ct. App. July 5, 2018)(The checked boxes requiring repayment of court costs was not a "final restitution order" under Swartz and Jackson.); State v. Pearl, No. 13-0796, 2014 WL 1714490, at *5 (Iowa Ct. App. April 30, 2014)("Because the plan of restitution was not complete in the case by the time the notice of appeal was filed, we are unable to consider this issue at this time."); State v. Hols, No. 10-1841, 2013 WL 750307, at *2 (Iowa Ct. App. Feb. 27, 2013)(Judgment entry did not set an amount of attorney fees; defendant may seek relief pursuant to section 910.7); State v. Wilson, Nos. 1-104, 00-0609, 2001 WL 427404, at *3 (Iowa Ct. App. April 27, 2001)("We cannot address this issue at this time because no plan of restitution was completed at the time Wilson filed his notice of appeal and the record before us on appeal contains no court order dictating a plan for payment of restitution."). The Court of Appeals summed up the rule in Alexander:

Our rule regarding the ability to appeal a restitution order can be summarized as follows: A restitution order is not

appealable until it is complete; the restitution order is complete when it incorporates both the total amounts of the plan of restitution and the plan of payment. A defendant must also petition the court for a modification before they challenge the amount of restitution. If the above requirements are met, our Constitution requires the court to make a finding of the defendant's reasonable ability to pay.

State v. Alexander, No. 16-0669, 2017 WL 510950, at *3 (Iowa Ct. App. Feb. 8, 2017).

In addition to being contrary to the Supreme Court's pronouncement in the Harrison and Haines line of cases, Swartz and Jackson line of cases fail to adequately take into consideration the legislature provided the practical process of assessing court costs and attorney fees. The clerk of court is tasked with the duty of implementing the criminal judgment order. Iowa Code § 602.8102(141) (2017)("Carry out duties relating to the entry of judgment as provided in rule of criminal procedure 2.23, Iowa court rules."). The clerk of court must collect the court reporter fees. Iowa Code §§ 625.8 and 602.8102(99) (2017). The clerk is also to carry out duties related to probations and restitutions. Iowa Code §

602.8102(135) (2017) ("Carry out duties relating to deferred judgments, probations, and restitution as provided in sections 907.4 and 907.8, and chapter 910."). The clerk of court also is to collect filing fees in criminal cases where judgment is rendered. Iowa Code § 602.8106(1) (2017). As a practical matter, once the district court orders a defendant to pay court costs and attorney fees, the clerk of court assesses the amount authorized by Code or the amount paid by the State Public Defender. There is no further order containing a specific amount entered by the court.

The clerk is required to send the restitution plan to the Department of Correctional Services if the defendant is placed on probation. Iowa Code §§ 907.8 and 910.4 (2017). The court is required to send the restitution plan to the Department of Correction if the defendant is incarcerated. Iowa Code § 910.5(1)(a) (2017). The clerk of court carries out this duty for the court. Iowa Code § 602.8102(135), (141) (2017). The restitution plan is complete after sentencing

when the clerk assesses the fines, fees, surcharges and other restitution as order by the judgment order. In general, nothing more will filed unless the defendant is sentenced to custody of the Department of Corrections. The Department of Corrections is required to "prepare a restitution plan of payment or modify any existing plan of payment." Iowa Code § 910.5(1)(d) (2017).

The restitution plan of payment is final at the time of sentencing. Generally, the court requires payment of fines, surcharges, attorney fees and other restitution be paid the day of sentencing. Iowa Ct. R. 26.2(1)("A person shall be instructed to pay the court debt with the office of the clerk of court on the date of imposition of the court debt."); Iowa Code § 602.807(1)(a)(" "Court debt" means all fines, penalties, court costs, fees, forfeited bail, surcharges under chapter 911, victim restitution, court-appointed attorney fees or expenses of a public defender ordered pursuant to section 815.9, or fees charged pursuant to section 356.7 or 904.108."). See

(3/12/18 Court Order)(App. pp. 47-49). However, at sentencing, the court may establish a payment plan. Iowa Ct. R. 26.2(2)(1)-(5). Under either option provided by Iowa Court Rule 26, the restitution plan of payment is established at the time of sentencing.

The law regarding the defendant's reasonable ability to pay is conflicting and confusing. This Court should take this opportunity to clarify the law to aid the bench and bar. Must the sentencing court determine a defendant's reasonable ability to pay criminal restitution for court cost and attorney fees. Petty respectfully submits the Harrison and Haines Courts were correct in its holding that in order to pass constitutional muster the reasonable ability to pay determination must be made at the time of sentencing, or upon supplemental request and order. If this determination was not made, the defendant can challenge it on direct appeal and overrule this portion of Swartz and Jackson. Additionally, the district court has the obligation to determine

the total amount of criminal restitution the defendant has the reasonability to pay, not the current installment as held in Blank. If the installment amount is the determinative factor, a defendant's right to counsel will be chilled because the debt could last a life-time[5] and the reasonable ability to pay will be meaningless. To the extent Blank and Van Hoff hold otherwise, they should be overruled.

The district court must determine Petty's reasonable ability to pay the cost of his legal assistance and court costs prior to imposing the cost as part of criminal restitution. See Iowa Ct. R. 26.2(10)(c)("After the judicial officer makes a rule 26.2(10)(a) or (b) determination, the judicial officer shall set forth in the sentencing order the amount the person is required to pay for legal assistance."). Cf. State v. Jenkins, 788 N.W.2d at 646 (denying defendant an opportunity to challenge the amounts of the restitution order before the

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5 Court debt is not written off until 65 years after the date of imposition. Iowa Code § 602.8107(6) (2017).

district court implicates his right to due process.). The "reasonable ability to pay" determination is the sentencing court's duty. The district court failed to consider Petty's reasonable ability to pay prior to the order entering judgment for reimbursement of the court-appointed attorney fees and court costs. See State v. Coleman, 907 N.W.2d 124, 149 (Iowa 2018)(court must determine the defendant's reasonable ability to pay the attorney fees without requiring him to affirmatively request a hearing on his ability to pay.").

The case must be remanded for a determination of Petty's reasonable ability to pay the cost of his legal assistance and court costs. The district court should also consider the amount of interest, if any, which has been added to the original restitution amount and reduce this amount accordingly.

CONCLUSION

Kenneth Petty respectfully requests this Court vacate his guilty pleas and remand to the district court to allow Petty to

plead anew or stand trial. Alternatively, Petty requests this Court reverse the judgment and remand to the district court for a new hearing on his motion in arrest of judgment with new counsel. Otherwise, Petty respectfully requests the Court remand for hearing to determine whether defense counsel had an actual conflict and any other appropriate further proceedings. If the Court finds the record is inadequate to resolve the claims of ineffective assistance, the claims should be preserved for a postconviction relief action.

Lastly, Petty respectfully request the Court vacate the district court's imposition of the section 911.2B sexual abuse victim surcharge and remand for entry of a corrected sentencing order omitting such surcharge. A remand is also necessary for the determination of Petty's reasonable ability to pay the cost of his legal assistance and court costs.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $6.83, and that amount has been paid in full by the Office of the Appellate Defender.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION OF BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

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